

Madras High Court

Dr. Anu Gayathri vs Dr. K.Karthikeyan on 4 September, 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED: 04.09.2008  
CORAM:  
THE HONOURABLE MR.JUSTICE K.MOHAN RAM  
Criminal Original Petition No.17617 of 2008  
and M.P.No.1 of 2008

Dr. Anu Gayathri

.. Petitioner

-Vs.-

1. Dr. K.Karthikeyan  
2. Dr. T.P.Kalanithi  
3. Mrs. K.Kowsalya  
4. Mr. Hari  
5. State by Deputy Superintendent of Police  
C.B.C.I.D. Metro Wing, Chennai

.. Respondents

Prayer: Criminal Original Petition filed under Section 482 of the Criminal Procedure Code  
For Petitioner : Mr. Anantha Narayanan  
For Respondents : Mr. B.Sriramulu, Senior Counsel, for  
Mr. A.M.Rahmath Ali, for R-1 to R-4.  
Mr. A.Saravanan, Govt. Advocate (Crl. Side), for R-5.

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O R D E R

In the above petition filed under Section 482 of the Criminal Procedure Code the petitioner is seeking permission to engage a private counsel of her choice to continue further the prosecution case in C.C.No.3260 of 2007 on the file of the IV Metropolitan Magistrate, Saidapet, Chennai □600 015.

2. The brief facts which are necessary for the disposal of the above Criminal Original Petition are set-out below:-

The petitioner is the defacto complainant in C.C.No.3260 of 2007 and respondents 1 to 4 are the accused therein who are facing trial for an alleged offence under Sections 498 (A) and 406 IPC read with Sections 4 and 6 of the Dowry Prohibition Act. The trial was conducted by the Public Prosecutor, C.B.C.I.D., Metro Wing, Chennai. According to the petitioner, since few witnesses have been won over by the accused the Additional Public Prosecutor dispensed with the witnesses; one of the witnesses dispensed with is Mrs.Harini, daughter of second and third accused and the sister of the first accused; it is alleged in the petition that on the advice of one Mr.Shahjahan, the

Investigating Officer, the second respondent by using his influence with the Law Minister's Office got the Public Prosecutor, C.B.C.I.D., Metro Wing, Chennai, transferred and another Public Prosecutor of Coimbatore origin and known to the second accused family had been specially appointed to be in Additional In-charge of the prosecution and if the trial is conducted by such a Prosecutor there is no scope for any justice to the petitioner and on the further ground to prevent the abuse of process of Court and to secure the ends of justice the above petition is said to have been filed.

3. Respondents 1 to 4 have filed a detailed counter affidavit specifically denying each and every allegations made against them in the petition. It is stated in the counter affidavit that no material whatsoever has been produced in support of the allegation that the second respondent used his influence with the Law Ministry to get the Public Prosecutor transferred. It is pointed out in the counter affidavit that not even a supporting affidavit has been filed in the above petition. It is stated in the counter affidavit that the Prosecutor, who was appointed in place of the Public Prosecutor, C.B.C.I.D., Metro Wing, has since been transferred. The very maintainability of the above Criminal Original Petition is questioned on the ground that specific provision under Section 302 of the Criminal Procedure Code is available which enables the defacto complainant to seek permission from the learned Magistrate trying the case to engage a private counsel. When Section 302 Cr.P.C. enables the petitioner to seek the remedy which is sought for in the above Crl.O.P., the above Crl.O.P., filed under Section 482 of the Cr.P.C. is not maintainable. It is further stated in the counter affidavit that earlier the petitioner filed a petition before the Magistrate seeking permission under Section 301 of the Cr.P.C. and the petitioner was permitted to engage a private counsel to assist the Public Prosecutor and pursuant to such permission granted the petitioner actually engaged a private counsel and such counsel was assisting the Public Prosecutor all through; a total of 35 witnesses were cited in the charge sheet and as on 28.05.2008, 22 witnesses have been examined and another 10 witnesses have been dispensed with. When 3 more witnesses namely the learned Magistrate, who recorded 164 statement of witnesses, the Inspector of Police and the Deputy Superintendent of Police remained to be examined, the regular Prosecutor was transferred on 28.05.2008. After his transfer on 12.06.2008 the in-charge Prosecutor examined the Magistrate who recorded 164 statements as P.W.23 and having kept quiet the petitioner filed the above petition only on 02.07.2008. It is further stated in the counter affidavit that when the case came up on 04.07.2008 the Inspector of Police has been examined in chief as P.W.24 and even at that time the petitioner did not reveal to the trial court about the filing of the above petition before this Court; thereafter the case was adjourned to 14.07.2008 and even on that date no petition was filed under Section 302 Cr.P.C., but on 17.07.2008 the petitioner filed a petition under Section 302 Cr.P.C., and another petition under Section 309 Cr.P.C., seeking for permission and adjournment respectively.

4. It is further stated in the counter affidavit that the petition filed under Section 302 Cr.P.C., was returned on the ground that no supporting affidavit had been filed with a further direction to represent the same with the affidavit if the petitioner so desires; since both the Inspector of Police and the Deputy Superintendent of Police were present in the Court the petition under Section 309 Cr.P.C., seeking adjournment was dismissed and they were examined as P.Ws.24 and 25 and the case was posted to 24.07.2008 for examination of the accused under Section 313 Cr.P.C. and on 24.07.2008 the accused were examined under Section 313 Cr.P.C. and the case was adjourned to

07.08.2008 for defence witnesses. It is further stated in the counter affidavit that the petitioner cannot simultaneously seek the very same relief both before the trial court as well as before this Court. In the counter affidavit it is also stated that on a petition filed by the petitioner a direction was issued by this Court to the trial court directing it to expedite the trial of the case and only with a view to harass the accused the present petition has been filed and on the aforesaid contentions respondents 1 to 4 seek dismissal of the above petition.

5. The fifth respondent-Investigating Officer has also filed the counter affidavit denying the various allegations contained in the petition. It is stated in the counter affidavit that on the transfer of Thiru.Balachandranath, Assistant Public Prosecutor, C.B.C.I.D., in order to obey the directions of this Court to complete the trial within the period of six months Tmt.Uma, Assistant Public Prosecutor, IV Metropolitan Magistrate Court, Chennai, where the trial is in progress was placed in-charge of the C.B.C.I.D. to continue the trial of the case. It is specifically stated in the counter affidavit that the question of nativity of A.P.P. was not taken into consideration. It is stated that the apprehension of the petitioner that the continuation of proceedings by the present Prosecutor will only be a farce and a mockery of justice is baseless.

6. Heard the learned counsel on either side and the learned Govt. Advocate (Crl. Side). Elaborate submissions were made by the learned counsel on either side. Since the very maintainability of the above Criminal Original Petition has been questioned by respondents 1 to 4, before going into the merits of the case, the maintainability of the above Criminal Original Petition has to be gone into first.

7. Learned senior counsel for respondents 1 to 4 submitted that the petitioner could have filed a petition under Section 302 Cr.P.C. and sought for permission of the learned Magistrate to engage a private counsel of her choice to conduct the prosecution but no such petition has been filed but a petition under Section 482 of the Cr.P.C., has been filed directly before this Court and therefore the above petition is not maintainable. He further submitted that there cannot be two Public Prosecutors in the same case and there is no provision in the Criminal Procedure Code to handover the case diary to the counsel appointed by a private party and therefore the private counsel cannot be engaged by the petitioner to conduct the prosecution. He, by relying upon a decision of the Apex Court reported in 1965 M.L.J. (Cri) 72 (The State of Uttar Pradesh v. Singhara Singh and others), submitted that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. Elaborating further the learned senior counsel submitted that when admittedly Section 302 Cr.P.C., enables the petitioner to file a petition seeking permission from the learned Magistrate to engage a counsel of her choice to conduct the prosecution without filing such a petition the petitioner cannot directly approach this Court under Section 482 of the Cr.P.C. He further based reliance on the following observation of the Hon ☐ble Apex Court in paragraph 140 of the decision reported in AIR 1988 Supreme Court 1531 (A.R.Antulay v. R.S.Nayak) namely:-

<sup>TM</sup>40 ... No appeal could be made to the doctrine of inherent powers of the Court either. Inherent powers do not confer, or constitute a source of, jurisdiction. They are to be exercised in aid of a jurisdiction that is already invested....☐Learned senior counsel also made extensive submissions

touching upon the merits of the case and regarding the power of the trial court to put questions under Section 165 of the Indian Evidence Act.

8. On the scope and ambit of Section 302 Cr.P.C. and about the maintainability of the above petition Mr. Anantha Narayanan learned counsel for the petitioner made the following submissions:-

Learned counsel basing reliance on the decision of the Apex Court reported in (2001) 3 Supreme Court Cases 462 (J.K. International v. State and others) submitted that a petition under Section 302 Cr.P.C., is maintainable and if a case is made out the learned Magistrate is bound to grant permission to a person to engage a counsel of her choice to conduct the prosecution. In the said decision in paragraphs 11 and 12 the Apex Court has observed as under:-

“1. In view of such a scheme as delineated above how can it be said that the aggrieved private person must keep himself outside the corridors of the court when the case involving his grievance regarding the offence alleged to have been committed by the persons arrayed as accused is tried or considered by the court. In this context it is appropriate to mention that when the trial is before a Magistrate’s Court the scope of any other private person intending to participate in the conduct of the prosecution is still wider. This can be noticed from Section 302 of the Code which reads thus:

“302. (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

12. The private person who is permitted to conduct prosecution in the Magistrate’s Court can engage a counsel to do the needful in the court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against anyone in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates’ Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police.”

9. Learned counsel for the petitioner also relied upon a decision of the learned Single Judge of this Court dated 16.03.2005 passed in Criminal Revision Petition No.820 of 2004. In the said decision the learned Judge after referring to the various decisions of the Apex Court including the aforesaid decision relied upon by the learned counsel for the petitioner observed as under:-

™. .... When Section 302 Cr.P.C. permits the conduct of prosecution by the complainant personally or by a pleader and when permission could be granted for that purpose by the Magistrate and when the reasonings are also found convincing, then there is no ground to set aside the said impugned order□

10. Learned counsel for the petitioner further submitted that under Section 482 Cr.P.C., this Court has got ample power to give any direction to prevent the abuse of process of Court and to secure the interest of justice and therefore the availability of an alternative remedy under Section 302 Cr.P.C., will not stand in the way of the petitioner approaching this Court under Section 482 of the Cr.P.C. Learned counsel also submitted that on 17.07.2008 the petitioner filed a petition under Section 302 Cr.P.C., and another petition under Section 309 Cr.P.C., seeking adjournment of the case to enable the petitioner to engage a private counsel of her choice to conduct the prosecution but the adjournment petition filed under Section 309 Cr.P.C., was dismissed on 17.07.2008 itself and the petition filed under Section 302 Cr.P.C., was returned with the following endorsement:-

□Returned.

(1) Allegations are made in connection with appointment of APP as well as against her as if she is known to second accused. Hence file affidavit of the defacto complainant to that effect if so desired.

(2) Already permission granted to assist prosecution. Hence the petition is returned.

Sd/-.

17.07.2007.□

11. I have considered the said submissions made by the learned counsel on either side. In the decision reported in (2001) 3 SCC 462 (referred to supra) while considering the scope of Section 302 Cr.P.C., the Apex Court has made the following observations namely:-

□If the court thinks that the cause of justice would be served better by granting such permission the Court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates□Courts□

Therefore the contention of the learned senior counsel that the petitioner is not entitled to engage a private counsel of her choice under Section 302 Cr.P.C. cannot be countenanced.

12. The submission of the learned senior counsel based on the decision of the Apex Court reported in 1965 M.L.J. (Cri) 72 (referred to supra) that where a power is given to do a certain thing in a certain

way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden has been subsequently reiterated by the Apex Court in a number of cases. It is true that when Section 302 Cr.P.C., specifically enables a person to seek permission of the learned Magistrate for engaging a private counsel of his / her choice to conduct the prosecution such permission should be obtained only from the learned Magistrate and not from this Court by invoking Section 482 of the Criminal Procedure Code. The contention of the learned counsel for the petitioner that under Section 482 of the Criminal Procedure Code powers of this Court are not limited as any direction could be issued to secure the ends of justice and to prevent the abuse of power of the Court cannot also be accepted in view of the following well settled proposition of law laid down by the Apex Court in a catena of decisions namely:-

One of the important pre-condition which is necessary for the exercise of the powers under Section 482 Cr.P.C., is that there exists no other provisions of law by which the party aggrieved should have sought relief. In this context it will be useful to refer to the following decisions of the Apex Court:-

□ In Kushi Ram Vs. Hashim (AIR 1959 SC 542), a three judges Bench of the Supreme Court has held that:

"It is unnecessary to emphasis that the inherent power of the High Court under Section 561(A) cannot be invoked in regard to matters which are directly covered by the specific provisions of the Code;....."

This was reiterated again in R.P.Kapur Vs.State of Punjab (AIR 1960 SC 866), while interpreting the Section 561(A) under the 1898 Code (which was identical with Section 482 Cr.P.C of the 1973 Code) as follows:

"Inherent power of the High Court under Section 561(A) Cr.P.C cannot be exercised in regard to matters specifically covered by the other provisions of the Code."

In Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others (1983 SC 67), the Supreme Court laid down that Section 482 Cr.P.C can be exercised only when no remedy is available and not for specific remedy is provided by the Statute.

In Janata Dal Vs. H.S.Chowdhary (1993 Crl.L.J 600), the Supreme Court held that:

"the powers possessed by the High Court under Section 482 Cr.P.C are very wide and very plenitude of the power requires great caution in its exercise and that the inherent powers cannot be used as appeal or revision."

In Palaniappa Gounder Vs. State of Tamil Nadu (AIR 1977 SC 1323), the Supreme Court has held that:

"This is put in another form by saying that if there is an express provision in a statute governing a particular subject matter, there is no scope for invoking or exercising the inherent powers of the



Court, because the Court ought to have applied the provisions of the statute which are made advisedly to govern the particular subject matter."

In Arun Shankar Shukla Vs. State of Uttar Pradesh and Others (AIR 1999 SC 2554), the Supreme Court has held the power under Section 482 Cr.P.C cannot be exercised in the matter covered by specific provisions of the Code.

In L.V.Yadev Vs.Shankarrao (AIR 1983 SC 1219), it is held that:

"the discretionary provision in Section Section 482 Cr.P.C is not intended to by-pass the prescribed procedure and is to be sparingly exercised where the process of law is being misused to harass a citizen. The process means anything done by Court."

11. In State Vs.M.Devendrappa ((2002)3 SCC 89), referring to previous Judgments in various cases, the Supreme Court has summarised the principles on this aspect. As per that decision one of the important conditions which is necessary for the High Court to exercise the power is that "there exists no other provision of law by which the party aggrieved could have sought relief."

13. In the light of the law laid down by the Apex Court in the above said decisions the contention of the learned counsel for the petitioner cannot be countenanced and it has to be held that the petition filed under Section 482 of the Cr.P.C., cannot be entertained by this Court.

14. Though the learned senior counsel for respondents 1 to 4 submitted that the petitioner had not filed a petition under Section 302 Cr.P.C., it is seen from the papers filed in the additional typed set by the petitioner that actually on 17.07.2008 the petitioner had filed a petition under Section 302 Cr.P.C., together with a petition under Section 309 Cr.P.C., seeking adjournment but the learned Magistrate has returned the petition under Section 302 Cr.P.C., with an endorsement as noted above and dismissed the petition filed under Section 309 Cr.P.C., and after dismissing the petition filed under Section 309 Cr.P.C., the further examination of the witnesses continued and now all the prosecution witnesses have been examined and the examination of the accused under Section 313 Cr.P.C., also is over and the case is adjourned for defence witnesses and at that stage this Court has stayed the proceedings.

15. Since now this Court has held that Section 302 Cr.P.C., enables the petitioner to seek permission of the learned Magistrate to engage a private counsel of her choice to conduct the prosecution and the above CrI.O.P., is not maintainable in view of the availability of effective and alternative remedy under Section 302 Cr.P.C., proper direction has to be issued to the learned Magistrate regarding the disposal of the petition filed by the petitioner under Section 302 Cr.P.C., on 17.07.2008 and which has been returned for not filing a supporting affidavit. Admittedly the petition filed under Section 302 Cr.P.C., by the petitioner has only been returned and not dismissed on merits. Therefore this Court is not inclined to go into the merits and demerits of the rival contentions put forth by the learned counsel before this Court, since such contentions have to be raised before the learned Magistrate and the same have to be considered by the learned Magistrate on merits. Therefore the petitioner is given liberty to represent the petition filed under Section 302 Cr.P.C., on 17.07.2008

with a supporting affidavit within one week from today after serving copy of the same on the learned counsel appearing for the accused in C.C.No.3260 of 2007 on the file of the IV Metropolitan Magistrate, Saidapet, Chennai □600 015 and the fifth respondent. The accused / respondents 1 to 4 herein and the Public Prosecutor appearing on behalf of the State shall file their respective counter affidavits within a period of one week from the date of service of the petition and affidavit filed under Section 302 Cr.P.C., and the learned Magistrate shall dispose of the petition within ten (10) days therefrom. The petitioner, respondents 1 to 4 and the fifth respondent shall render all assistance to the learned Magistrate in disposing of the petition within the time stipulated above and they shall not seek any adjournment on any ground. It is made clear that this Court has not expressed any opinion on the merits, on the correctness or otherwise of the allegations and the counter allegations made by the petitioner and the respondents herein and it is open to them to raise all the contentions before the learned Magistrate who will consider the same on merits and in accordance with law without in any way being influenced by anything said in this order. The trial in C.C.No.3260 of 2007 shall be continued further only after disposal of the petition filed under Section 302 Cr.P.C.

16. With the above observations, the Criminal Original Petition is disposed of. Consequently the connected MP is closed.

srk To

1. The IV M.M., Saidapet, Chennai □600 015.
2. The Public Prosecutor, Madras High Court, Chennai 104